United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1222

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P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 74-1222

FRANK GRASSO,

Petitioner-Appellee,

-v.-

JOHN J. NORTON, Warden, Federal Correctional Institution, Danbury, Connecticut, et al.,

Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE PETITIONER-APPELLEE

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Statement of the Case

The United States has taken this appeal under 28 U.S.C. §2253 on behalf of the Respondents below from an order of the United States District Court for the District of Connecticut (Newman, J.) ordering the petitioner-appellee, Frank Grasso, released from incarceration. The decisions below are published at 371 F. Supp. 171 and 376 F. Supp. 116 (D. Conn. 1974).

On July 16, 1973, appellee Frank Grasso, then an inmate at Danbury Federal Correctional Institution, filed a pro se petition for a writ of habeas corpus, alleging that the United States Board of Parole had wrongfully denied him parole. On July 20, the District Court (Newman, J.) appointed counsel. After fully exhausting administrative remedies, counsel filed an amended petition for a writ of habeas corpus on December 19, 1973, pursuant to 28 U.S.C. §2241, alleging that the United States Board of Parole had wrongfully denied petitioner any further parole consideration for the entire length of his three year sentence under 18 U.S.C. §4208(a)(2), on the basis of an initial parole hearing held less than three months after his incarceration. On February 5, 1974, the Court (Newman, J.) in Grasso v. Norton, 371 F. Supp. 171 (D. Conn. 1974) ("Grasso I") ordered that the writ of habeas corpus would issue discharging the petitioner unless the Board rescinded its previous order continuing the petitioner to the expiration of his sentence and substituted a new order granting him a parole hearing at a date at or prior to the expiration of one-third of his sentence. 371 F. Supp. at 175.

In the District Court and then again in this Court, the respondents moved for and were denied a stay pending appeal. Believing that one-third of the petitioner's sentence would expire in seven days, however, the District Court granted a short stay, extended by this Court to March 1, so that hearing examiners could be dispatched from Washington to Danbury to conduct the hearing.[1/] But despite these stays, the respondents did not give the

1/ The Government now contends, and the appellee concedes, that in fact the petitioner had reached the one-third mark of his sentence on January 23, 1974, including credit for pre-sentence jail time. At the time of the proceedings below, however, neither the Court nor either of the parties was aware of this fact, nor does it have any significance in this case, in view of the stays that were granted. (Respondents Brief, at 8).

petitioner an institutional review hearing as ordered. Instead, they conducted a "review on the record" in Washington, D.C., on March 1, 1974, and again continued the petitioner to the expiration of his sentence. Respondents did not apply to the District Court to modify its order to permit this "file review" in Washington. When petitioner's counsel was informed that there would be a "review on the record" in Washington he sent a telegram of protest.

On March 4, 1974, petitioner filed for supplementary relief praying that the Court issue the writ of habeas corpus for failure of the Board to comply with the previous orders. On April 30, 1974, in Grasso v. Norton, 376 F. Supp. 116 (D. Conn. 1974)("Grasso II") Judge Newman ruled that a regular hearing at the institution ("institutional review hearing") is required for inmates sentenced pursuant to 18 U.S.C. §4208(a)(2) at or prior to the expiration of one-third of their sentence. Finding that the respondents had not complied with the conditions of the Court's prior order, the Court issued the writ of habeas corpus discharging petitioner from incarceration.

Statutes Involved

TITLE 18, UNITED STATES CODE

§4202.

"A federal prisoner, other than a juvenile delinquent or a committed youth offender, wherever confined and serving a definite term or terms of over one hundred and eighty days, whose record shows that he has observed the rules of the institution in which he is confined, may be released on parole after serving one-third of such term or terms or after serving fifteen years of a life sentence or of a sentence of over forty-five years."

§4208(a).

"Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interests of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than, but shall not be more than one-third of the maximum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may become eligible for parole at such time as the board of parole may determine."

TITLE 28, CODE OF FEDERAL REGULATIONS
39 Fed. Reg. 20029 (June 5, 1974)

§2.14(b).

"A prisoner with a sentence under 18 U.S.C. 4208(a)(2) or 924 who receives a continuance to a date past one-third of his maximum sentence at an initial hearing shall upon completion of one-third of his sentence receive a review by an examiner panel on the record (including a current institutional progress report)."

Issues Presented

1. Is an individual sentenced pursuant to 18 U.S.C. §4208(a)(2) entitled to parole consideration at such time at or before the expiration of one-third of his sentence that he could reasonably be expected to demonstrate that his institutional record and rehabilitative progress warrant release on parole?

2. a. Is an institutional review hearing required on or before the expiration of one-third of an (a)(2) sentence to enable an inmate to demonstrate that his institutional record and rehabilitative progress warrant his release on parole after he has been denied parole on the basis of an initial hearing held less than three months after he had been incarcerated?

b. Did the District Court properly find that the "file review" (review on the record) afforded the petitioner in this case did not comply with the requirements of 18 U.S.C. §4208(a)(2)?

3. Did the District Court properly find that the respondents had not complied with its order?

Statement of Facts

On February 13, 1973, the United States District Court for the Northern District of New York (Foley, C.J.) sentenced petitioner-appellee Frank Grasso to three years' imprisonment and two years' special parole pursuant to 18 U.S.C. §4208(a)(2) for distribution of methamphetamine in violation of 21 U.S.C. §841(a)(1). In sentencing petitioner the Court stated:

> I am going to sentence you to a period of three years to an institution designated by the Attorney General, but the sentence in this type of case is in your favor. You are sentenced under Title 18, Section 4208(a)(2), which means that the Board of Parole may determine your eligibility for parole. It depends upon your behavior at Danbury, ... the Board of Parole will determine when they think you are eligible to be released to the public.

Quoted in Grasso v. Norton, 371 F. Supp. 171, 174 (D. Conn. 1974).

On May 7, 1973, less than three months after he had been sentenced, petitioner was given a parole hearing at the Federal Correctional Institution at Danbury, Connecticut. Two days later he received notice of the Parole Board's order that he was to be "continue[d] to expiration" without a further parole hearing. 371 F. Supp. at 172.

On July 16, 1973, petitioner filed a pro se petition for a writ of habeas corpus, alleging that the United States Board of Parole had wrongfully denied him parole. On December 19, 1973, after all administrative remedies had been exhausted, petitioner, by counsel, filed an amended petition for a writ of habeas corpus, alleging that the United States Board of Parole had wrongfully denied him parole consideration for the full length of his three

year (a)(2) sentence when it ordered him continued to the expiration of his sentence on the basis of a parole hearing held only three months after he was sentenced.

On February 5, 1974, in Grasso v. Norton, 371 F. Supp. 171 (D. Conn. 1974)(Grasso I) Judge Newman granted a conditional writ. Judge Newman held that the Board had given petitioner less effective parole consideration than if petitioner had not received an (a)(2) sentence. With a regular adult sentence, petitioner would have had one year (one-third of his sentence) to demonstrate the rehabilitative progress which would warrant release on parole instead of less than three months. 18 U.S.C. §4202.

Finding this action of the Board of Parole contrary to the purpose of §4208(a)(2), the Court ordered that the writ of habeas corpus would issue unless the petitioner was given parole consideration at or prior to the expiration of one-third of his sentence. 371 F. Supp. at 175.

On February 11, 1974, respondents moved the District Court to stay its order pending appeal. Believing that the petitioner would reach the one-third point of his sentence on February 14, 1974, the District Court granted a limited stay until February 21, so that "the parole board may have an opportunity to dispatch hearing examiners to the Federal Correctional Institution at Danbury." 376 F. Supp. at 121. The text of this order had been drafted by the Government's counsel. On February 19, 1974, appellants requested the Court of Appeals to stay the order of the District Court pending appeal.

Circuit Judges Lumbard, Friendly and Timbers denied a stay pending appeal but granted a limited stay to March 1, 1974. The panel indicated in open court that the purpose of the stay was to give the Board time to send hearing examiners to Danbury for Grasso's hearing. Id.

On Monday, February 24, Grasso's institutional caseworker was informed that hearing examiners would be at the institution on Thursday, February 28, to give Grasso a parole hearing. The caseworker was instructed to prepare a regular progress report for that hearing. Tr. of March 8 Hearing at 87-88. At that time Grasso signed the standard form officially acknowledging notice of the hearing. The form also informed him that he could have a representative present, and that he could appeal an adverse decision. Later that same day both Grasso and his caseworker were informed that the institutional review hearing had been changed to Wednesday, February 27. In preparation Grasso arranged for a personal representative to attend the hearing. On Tuesday morning, February 26, Grasso's caseworker interviewed him and composed a standard institutional parole progress report. 376 F. Supp. at 121.

Tuesday afternoon Danbury F.C.I. officials informed Grasso that he would not receive a hearing, but rather that he would be released on Friday, March 1. They also told him that the Parole Board was "appealing the whole case." Tr. of March 8 Hearing at 147. Grasso was then allowed to call his wife to inform her of the change of events and to arrange with her to come to meet him upon his release that Friday. 376 F. Supp. at 121.

On Wednesday, February 27, at the request of the Parole Board, Danbury F.C.I. officials transmitted to Washington the parole report that had previously been prepared for Grasso's expected institutional review hearing. Id. A neuropsychiatric summary and a medical summary which were referred to in the report, and which were meant to be attached, were not transmitted. 376 F. Supp. at 122 n.7. Danbury officials were not told the reason the report was being transmitted to Washington, and they continued to assure Grasso of his March 1 release. Id. at 121.

On February 28, Grasso was given the standard prison checkout sheet. Prison officials told him to secure the necessary signatures on this form, which he did. He then completed parole and mandatory release papers in preparation for his release the following morning. Late that afternoon the Parole Board, without ever having sought a modification or clarification of the District Court's order, informed prison officials, who in turn informed Grasso, that he was not to be released, as they were going to conduct a "hearing" on his case in Washington. On Friday, March 1, a "file review" of Grasso's case was conducted in Washington. At this review, the hearing examiner panel ordered once again that Grasso be continued to expiration without parole or further hearings. Id.

On March 4, petitioner moved for supplementary relief in the District Court, arguing that the file review procedure did not satisfy the District Court's conditional order. Petitioner further argued that even assuming, arguendo, that an adequate file review could satisfy the court's order,

the file review in his case was not adequate. Judge Newman held a hearing that same day, at which time he granted petitioner enlargement, releasing him on his personal recognizance to the custody of a probation officer in his home town, subject to regular parole conditions. On March 8, 1974, an evidentiary hearing was held on petitioner's motion for supplemental relief at which time petitioner, his caseworker at Danbury, and his psychiatrist at Danbury testified. On March 19, 1974, the District Court, in an unrelated case, Diaz v. Norton, 376 F. Supp. 112 (D. Conn. 1974), noting that the issue of whether a file review was consistent with the requirements of §4208(a)(2) was presently sub judice, ruled that until that issue was decided regular institutional hearings were to be provided (a)(2) inmates at or before the one-third point of their sentence. On April 5, 1974, respondent moved for a re-opening and reconsideration of the Diaz decision, urging that if compliance with Grasso I required a regular parole hearing, such a ruling should be given prospective application only. Grasso and Diaz were then consolidated, and on April 8, 1974, a hearing was held at which Peter Hoffman, the Board's Director of Research, testified concerning whether Grasso I should be made retroactive to inmates with (a)(2) sentences who had been continued beyond the one-third point of their sentences before the decision in Grasso I.

In Grasso v. Norton, 376 F. Supp. 116 (D. Conn. 1974) (Grasso II), Judge Newman held that Grasso I was to be fully retroactive and that regular institutional review parole hearings were required for (a)(2) inmates at the expiration

of one-third of their sentences. The Court also found that respondents had not complied with its order of February 5, and ordered that a writ of habeas corpus be issued, releasing petitioner Grasso from respondent's custody. The District Court entered judgment in favor of the petitioner on May 5, 1974, and on July 3, 1974, respondents filed a notice of appeal.

ARGUMENT

I.

AN INDIVIDUAL SENTENCED PURSUANT TO 18 U.S.C. 4208(a)(2) IS ENTITLED TO A PAROLE HEARING ON OR BEFORE THE EXPIRATION OF ONE-THIRD OF HIS SENTENCE AT WHICH HE CAN DEMONSTRATE THAT HIS INSTITUTIONAL RECORD AND REHABILITATIVE PROGRESS WARRANT RELEASE ON PAROLE.

In Grasso I the Court held that an inmate sentenced pursuant to 18 U.S.C. §4208(a)(2), who has been denied parole less than three months after he was incarcerated, is entitled to be considered for parole at the completion of one-third of his sentence. The Court's holding was based upon the legislative history and intent of Congress regarding the special provisions of §4208(a)(2), and that section's relationship to the regular adult sentencing provision (18 U.S.C. §4202), as well as the interpretation and practical use of the (a)(2) section by federal district judges. Petitioner-appellee respectfully submits that the District Court ruled correctly in holding that continuing an (a)(2) inmate to the expiration of his sentence without further parole consideration after a hearing held less than three months of incarceration is contrary to the intent and purpose of §4208(a)(2). Such a procedure makes the inmate "worse off" than if he had not received an (a)(2) sentence and denies him the "beneficial purposes" for which the statute aims. 371 F. Supp. at 174, 175.

When Section 4208(a) was first proposed, Representative Emanuel Celler, Chairman of the House Judiciary Committee and author of the bill, stated:

> Section 4202 imposes a purely arbitrary limitation which does not take into account the varying responses which individual prisoners make to the rehabilitation program carried on in our Federal penal and correctional institutions.
>
> It frequently happens that a prisoner is ready for release before the statutory minimum of eligibility is reached ...
>
> A prisoner kept beyond that time very often becomes discouraged and bitter, and when he is finally released the benefit of the program has been lost ...
>
> These ... bills are designed ... to permit the release under supervision at an earlier date should the prisoner's response to the rehabilitation program justify it.

Hearing on H.J. Res. 424, H.J. 425 and H.R. 8923 Before Subcomm. No. 3 of the House Comm. on the Judiciary, 85th Cong., 2d Sess., ser. 14, at 5-6 (1958) ("Hearings").

The next witness, Deputy Attorney General Lawrence Walsh, speaking on behalf of the Justice Department, added:

> The purpose of this bill is to permit a judge to impose on him a sentence with a broad enough range between the minimum and the maximum so that [the Parole Board on the advice of prison authorities] can see his progress and pick that very moment when he is best suited to go back to the community and take an active part.

Hearings, supra, at 8-9 (emphasis added). The (a)(2) provision of Section 4208 was designed and intended to create a special class of offenders who would be eligible for release at any appropriate time, without having to serve the one-third of their sentences that would otherwise be required for parole eligibility. In this way parole board officials would see the progress of

such an inmate so that they could "pick that very moment when he is best suited to go back to the community." Id.[2/]

This interpretation finds support in, and is consistent with, federal district judges' use of the (a)(2) provision. 371 F. Supp. at 174. Judge Weinfeld, in amending a sentence to allow parole consideration under §4208(a)(2) upon a Rule 35 application for reduction or modification of sentence, observed that, "The Parole Board determines, based on all significant factors, whether the defendant's response to the institutional program has been such that release on parole is warranted. United States v. Zacharias, 365 F. Supp. 256, 257 (S.D.N.Y. 1973). Indeed, in this very case, Judge Foley intended this sentence to give petitioner an opportunity and incentive to obtain release before completion of his three year sentence. (See supra, p. 6)

2/ In disputing the lower Court's interpretation of the legislative history, the respondents contend that the primary purpose of §4208(a)(2) was the reduction of sentence disparities, a function the Government now alleges to be well-served by the Parole Board's guidelines. (Respondent's Brief, 13-16) The Government misinterprets the sections it quotes. Section 4208(a) emerged from H.J. Res. 425, introduced and considered together with other bills. One of these, H.J. Res. 424, proposed the establishment of Sentencing Institutes and Councils; it became the present 28 U.S.C. §334. The other, H.R. 8923, became the present 18 U.S.C. §4209, extending the maximum eligibility age for Youth Act sentences to 26. Senate Report 2013, 85th Cong., 2d Sess. (July 29, 1958), relied on by the Government, (Respondent's Brief 13-14), is thus inapposite. That report relates entirely to H.J. Res. 424, establishing sentencing institutes and councils, not to H.J. Res. 425, which is the subject of this case. Likewise, read in context, the general introductory remarks of Congressman Celler cited by the Government (Respondent's Brief, 13) clearly relate primarily to H.J. Res. 424. Celler's specific views on the (a)(2) provisions, cited by the petitioner-appellee and relied on by the Court below, demonstrate that his concern there was with the rigid, adverse parole impact of a long sentence. To the extent that §4208(a)(2) relates to sentence disparities at all, it was merely intended to allow a judge to give the Parole Board power to release an inmate before the expiration of one-third of his sentence, should his institutional achievements justify such release. This case arises in the context of the Board's failure to abide by that legislative mandate.

The correctness of the District Court's ruling is illustrated by comparing petitioner's situation as a result of his (a)(2) sentence with what he would have faced had he not been given the "benefit" of §4208(a)(2). Under the regular adult provisions of the federal sentencing statute (18 U.S.C. §4202) petitioner would have served one-third of his sentence, twelve months, before going before the Parole Board. This would have given him a realistic opportunity to demonstrate the rehabilitative progress which would warrant parole release. However, as a result of petitioner's (a)(2) sentence, he had served less than three months when the Board of Parole denied him any further parole consideration. As the District Court made clear, the petitioner was "thus ... worse off than if he had not received the benefits of §4208(a)(2)." 371 F. Supp. at 174.

The "Guidelines for Decision-Making" now used by the Board in determining parole release, see 28 C.F.R. §2.20, 39 Fed. Reg. 20031 (June 5, 1974),[3/] cause nearly all (a)(2) inmates to be in this disadvantaged position. Inmates sentenced pursuant to §4208(a)(2) receive an initial parole hearing within 90-120 days of incarceration and are then normally continued to a date within their calculated guideline range, which are based merely on "good" institutional conduct. 28 C.F.R. §2.20(b); 39 Fed. Reg. 20030 (June 5, 1974). As Judge Newman noted, three months "is a very brief time to determine whether prison performance has been so commendable as to justify a decision to release on parole at a time earlier than the Board's guidelines would specify." 371 F. Supp. at 174.

3/ The guidelines in effect when the petitioner was considered were substantially identical. See Respondents' Appendix at 1a.

Inmates sentenced under §4208(a)(2) are thereby effectively deprived of any opportunity to demonstrate the rehabilitative progress warranting release before the guideline time.

The District Court properly disposed of the Government's argument relying on 28 C.F.R. §2.21 (1973), cf. 28 C.F.R. §2.28, 39 Fed. Reg. 20035 (June 5, 1974), which provides: "Any case may also be specially reviewed at other times upon the receipt of any new information of substantial significance bearing upon the possibility of parole." As the Court below noted, the (a)(2) inmate should not have to depend upon the special provisions of §2.21 (1973) [or §2.28 (1974)] being invoked to provide him the same consideration the non-(a)(2) inmate automatically receives. 371 F. Supp. at 175. Furthermore, as the District Court pointed out, the "exceptionally good institutional program achievement" that 28 C.F.R. §2.20(c), 39 Fed. Reg. 20030 (June 5, 1974), indicates "may" warrant "[consideration] for earlier release" on parole, may not be sufficiently "new" or "substantial" to secure a special parole hearing pursuant to 28 C.F.R. §2.21 (1973). 371 F. Supp. at 175.

The District Court was correct, then, in holding that by ordering the petitioner continued to the expiration of his three-year sentence, on the basis of a hearing held less than three months after he was incarcerated, the Board of Parole had "frustrate[d] the purpose of §4208(a)(2) because petitioner now has lost the chance to demonstrate that his performance in prison over some substantial length of time justifies parole." 371 F. Supp. at 174. The Court

properly ordered the respondent to provide (a)(2) inmates additional parole consideration at the completion of one-third of their sentences to ensure that they would not be disadvantaged by having received a sentence under 18 U.S.C. §4208(a)(2).

II A.

A REGULAR "INSTITUTIONAL REVIEW" PAROLE HEARING IS REQUIRED AT OR BEFORE THE EXPIRATION OF ONE-THIRD OF AN (a)(2) SENTENCE TO ENABLE AN INDIVIDUAL TO DEMONSTRATE THAT HIS INSTITUTIONAL RECORD AND REHABILITATIVE PROGRESS WARRANT HIS RELEASE ON PAROLE.

In Grasso II the District Court properly ruled that the "file review" procedure adopted by the Board of Parole did not satisfy the requirement of §4208(a)(2) that (a)(2) inmates receive parole consideration at the completion of one-third of their sentence. As the Court stated, "the file review still runs counter to the purposes of §4208(a)(2) because it accords (a)(2) prisoners a form of parole consideration less satisfactory than that accorded non-(a)(2) prisoners." 376 F. Supp. at 118. The Court reached this conclusion after taking extensive expert testimony on the general hearing procedures of the Board, the Board's "file review" system, and the particular "file review" afforded petitioner.

At a regular parole hearing, which normally lasts fifteen to twenty minutes, the inmate is allowed to appear personally and bring with him a representative of his choice. He is usually questioned closely during that period and both he and his representative are allowed to make their own presentation, independent of responding to the hearing examiners' questions. In addition, the parole hearing examiners are able to call into play their clinical evaluation expertise. They can observe the demeanor of the individual and have the opportunity to question him and his representative. If further

clarification is desired by the examiners they can turn to the inmate's case manager, who attends the hearing and remains with the examiners after the inmate leaves the room. 376 F. Supp. at 118.

An inmate committed pursuant to a regular adult sentence receives such a hearing on completion of one-third of his sentence, after he has had a realistic opportunity to demonstrate the rehabilitative progress which would warrant release on parole. 18 U.S.C. §4202. That procedure is in marked contrast to that which the Board afforded petitioner Grasso and now proposes to employ with other individuals who have received the "benefit" of §4208(a)(2). At the completion of one-third of their sentences they receive only a "review on the record" at the Board's Washington, D.C., headquarters. 28 C.F.R. §2.14(b), 39 Fed. Reg. 20029 (June 5, 1974). They are deprived of a personal appearance before the parole board examiners, and they cannot have a personal representative appear on their behalf. The examiners are not able to observe the inmate or ask him questions, and if further information or clarification is desired, they must make an attempt to contact the inmate's case worker on the telephone from Washington. As the District Court found: "The differences are significant ... The fact that he had a hearing shortly after he arrived at the institution is no answer, because the very brevity of his time served before that first hearing precluded any realistic opportunity to persuade the examiners that his institutional progress merited parole." 376 F. Supp. at 118.

In addition, the (a)(2) inmate receiving a "review on the record" has a further disadvantage. To grant such an individual parole requires modifica-

tion of a previous board order. As the District Court stated:

> when the (a)(2) prisoner gets a file review at the one-third point, after having first received a setoff to a date well beyond the one-third point, the Board is starting with a slightly stacked deck. The decision is not whether and when should he be paroled; it is whether the setoff previously given should be changed. In all processes of decision-making, it is more difficult to undo a decision already made, then to decide the same issue on a clean slate.

376 F. Supp. at 118. Even with the "review in the record" procedure, an (a)(2) inmate is still "worse off than if he had not received the benefit of §4208(a)(2)." 371 F. Supp. at 174.

The district courts in this circuit which have considered this issue have agreed with Judge Newman's decision. See, e.g., Feliciano v. United States Board of Parole, 73 Civ. 4372 (S.D.N.Y., June 28, 1974)(Tenney, J.); Stokes v. Norton, H-74-157 (D. Conn., June 4, 1974)(Blumenfeld, J.); Matranga v. Norton, B-74-322 (D. Conn., Oct. 21, 1974)(Zampano, J.).[4/] Stroud v. Weger, _____ F. Supp. _____, Civ. No. 74-424 (M.D. Pa., Aug. 13, 1974), as well as other decisions of the Middle District of Pennsylvania which follow it, deVyver v. Warden, 74 Civ. 621 (August 23, 1974), Fillyaw v. Hogan, 74 Civ. 377 (August 15, 1974), agree with Judge Newman that (a)(2) inmates are entitled

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4/ cf. United States v. Slutsky, No. 74-2041 (2d Cir.), argued Oct. 21, 1974 (whether revelation of the handling of (a)(2) inmates under the guidelines constitutes new information justifying modification of sentence under Rule 35, F.R.Cr.P.). Compare United States v. Annechiarico, 71 Cr. 1062 (E.D.N.Y., Jan. 25, 1974)(Weinstein, J.)(motion granted); with United States v. Korner, 73 Cr. 984 (E.D.N.Y., August 26, 1974) (Neaher, J.)(motion denied). See also United States v. Morales, 72 Cr. 1153 (S.D.N.Y., July 1, 1974)(Knapp, J.)(court "recommends" compliance with Grasso I).

to parole consideration at the completion of one-third of their sentences and that "an (a)(2) prisoner cannot be given less effective parole consideration than a non-(a)(2) prisoner." Stroud v. Weger, supra, ____ F. Supp. at ____. Those courts, however hold that a "review on the record" at the one-third point of an (a)(2) inmates sentence is sufficiently equivalent to a full parole hearing at the institution where the inmate and his representative can appear. That belief cannot withstand analysis in the light of the significant difference between the two types of proceedings which Judge Newman, after taking expert testimony, made clear. Furthermore, the "'exhaustive list of factors which [the Parole Board] takes into consideration when parole is considered' including 'behavior changes,' 'the institutional experience,' and 'general personal adjustment,'"[5/] requires that if an (a)(2) inmate is to receive as effective parole consideration as the non-(a)(2) inmate he should have a regular "institutional review hearing" upon completion of one-third of his sentence. As Judge Newman stated in Grasso II: "there can be little doubt that such factors are better considered as a result of a personal interview than from a file review." 376 F. Supp. at 119.[6/]

5/ 376 F. Supp. at 119; see 28 C.F.R. §2.19, 39 Fed. Reg. 20030 (June 5, 1974).

6/ The Government's reliance on District Court decisions in the Fifth Circuit, Davis v. Henderson, Civ. No. 74-1012(a)(N.D. Ga., July 23, 1974); Scott v. United States, Civ. No. 74-1013(a)(N.D. Ga., July 16, 1974); Moody v. United States Board of Parole, Civ. No. 74-601(a)(N.D. Ga., April 1, 1974), overlooks the fact that all those decisions necessarily rely on Scarpa v. United States Board of Parole, 477 F.2d 278 (5th Cir.), vacated as moot. 414 U.S. 809 (1973). Clearly, they are inapposite in this circuit where United States ex rel. Johnson v. Chairman of N.Y. State Board of Parole, 500 F.2d 925 (2d Cir. 1974), defines a far different approach to judicial consideration of parole questions.

The Government's argument that an (a)(2) inmate benefits by knowing his expected guideline time earlier than does a non-(a)(2) inmate, even if true, is no answer to the less effective parole consideration afforded (a)(2) inmates by the Board. The obvious remedy for this situation is to tell everyone what his guidelines time is to be as early as possible, not to penalize inmates with regular adult sentences by making them wait. Furthermore, the Board's assertion that non-(a)(2) inmates first learn of their expected guideline time upon completion of one-third of their sentence, at their initial hearing, can only mean that is when they are first officially notified. Since the Board's guidelines are public, inmates can easily calculate their expected guideline range at any time. Indeed, such a calculation can be made before the inmate enters the institution since the only factors that can change during confinement are the attainment of a General Equivalency High School Diploma (G.E.D.), or a decision to marry. See "Guideline Evaluation Worksheet" for 28 C.F.R. §2.20(e), 39 Fed. Reg. 20034 (June 5, 1974).

Likewise, the Government's argument that scheduling an institutional review hearing at the one-third point of an (a)(2) sentence will create anxiety detrimental to rehabilitation cannot justify the less effective parole consideration afforded (a)(2) inmates. The Board could easily overcome this problem, if it exists, by telling the inmate at the initial (a)(2) hearing what his expected guideline time is, assuming good institutional achievement,

and explaining that he will be given another hearing upon completion of one-third of his sentence, but that he will not be granted parole at that time unless he demonstrates "exceptionally good institutional program achievement" that would warrant a decision outside the guidelines. In any case, this problem will only exist if the Board's guidelines develop into wooden standards. In that case any hearing except the initial hearing would be meaningless.

The District Court did not infringe upon the lawful discretion of the Parole Board in ruling that (a)(2) inmates are to be afforded institutional review hearings upon completion of one-third of their sentence rather than file reviews. The Government, in its own argument, admits that this could only be true if the "review on the record" were "legally acceptable." Respondent's Brief at 22. Since the "review on the record" affords (a)(2) inmates less effective consideration than non-(a)(2) inmates, this is not the case. As the District Court stated: "§4208(a)(2) requires that (a)(2) prisoners not be denied at the one-third point of their sentences as effective a hearing as is accorded at the same point to non-(a)(2) prisoners ..." 376 F. Supp. at 119. Moreover, the appellants' reliance on Scarpa v. U.S. Board of Parole, 477 F.2d 278 (5th Cir.) vacated as moot, 414 U.S. 809 (1973), is misplaced, as this Circuit has taken a significantly different approach to judicial consideration of parole questions; see, United States ex rel. Johnson v. Chairman of N.Y. State Bd. of Parole, 500 F.2d 925 (2d Cir. 1974)("some" due process applies). In any case, the Board has no discretion to act outside legal bounds. Morrissey v. Brewer, 408 U.S. 471 (1972); Johnson, supra at 930.

The Government uses statistics to support its argument that the court's ruling in Grasso II imposes an unnecessary administrative burden. These statistics assume that none of those inmates will receive parole at the one-third review. Certainly that would not be the case, and, as the District Court explained, further reductions in the Board's estimate would also occur. 376 F. Supp. at 120-121. Likewise, the government's argument fails to take sufficient account of the scheduled increase in parole board personnel. As the District Court found, after taking expert testimony, that although the number of added hearings is not precisely ascertainable, it "surely [is] not large enough to pose an administrative problem beyond the Board's capacity." 376 F. Supp. at 121.

Finally, if the Parole Board is faced with the prospect of foregoing some hearings in order to afford (a)(2) inmate hearings at one-third of their sentences, it would do better to omit either the first or the last hearing. At the first (a)(2) hearing, the only purpose is to determine the inmate's estimated guideline time. At the final hearing, the usual purpose is to exhort the inmate to do well on parole (Respondents' Brief, 19;Tr. 32-4). It is ludicrous for the Parole Board to oppose on the grounds of administrative convenience giving an inmate the only hearing at which he can have an opportunity to plead that his institutional record and rehabilitative progress justify release.

II. B

EVEN IF A "FILE REVIEW" (REVIEW ON THE RECORD) COULD COMPLY WITH THE STATUTE, THE DISTRICT COURT PROPERLY FOUND THAT THE "FILE REVIEW" (REVIEW ON THE RECORD) AFFORDED THE PETITIONER IN THIS CASE DID NOT COMPLY WITH THE REQUIREMENTS OF 18 U.S.C. §4208(a)(2).

A review on the record does not satisfy the requirements of §4208(a)(2). But, even if such a review, properly conducted, would satisfy the statute, the procedure afforded the petitioner in this case was so harmful and unfair to petitioner, and so cursorily and hastily prepared, that it cannot possibly constitute compliance with the District Court's order. On Monday, February 25, 1974, petitioner was informed he would receive an institutional review hearing on Thursday, February 28. Later the same day he was informed that the date of his institutional review hearing had been changed to Wednesday, February 27. In preparation the petitioner arranged for a personal representative to attend the hearing. On Tuesday morning, February 26, the petitioner's case manager interviewed him and composed a standard parole report. The case manager's report was made under the assumption that parole examiners would be coming to Danbury F.C.I., and a regular institutional review hearing would be held at which the case manager would be present. In addition, the petitioner, at the time of his interview, was of the belief that he would be able to appear personally before the parole examiners, and that he would have a personal representative appear on his behalf. 376 F. Supp. at 121.

Tuesday afternoon, February 26, the petitioner was informed by Danbury F.C.I. officials that he was not going to receive a hearing,

but rather that he would be released on Friday, March 1, and that the Parole Board would appeal "the whole case." When the petitioner's parole report was transferred to Washington, D.C. both his case manager and institutional officials were of the belief that no hearing of any type was going to be held. At that time no one who participated in the composing or forwarding of the report believed that a file review only was to be conducted. Id. In addition, as a result of the manner of transmittal, certain reports which were intended to be attached to the report and given to the parole hearing examiners were not submitted to the Parole Board. As the District Court found, "the progress report prepared at Danbury and sent to the Board of Parole in Washington stated that 'a neuropsychiatric summary and a medical summary will be attached to this progress report.' However, Grasso's case worker testified that he did not send these reports because he expected to hand them to the hearing examiners who he understood were coming to Danbury." 376 F. Supp. at 122 n.7.

Even though the Board decided on Wednesday, February 27, to conduct a file review, neither the petitioner nor the institution were notified until Thursday afternoon, February 28. Prison personnel thus were not given the opportunity of taking any action or submitting any additional information they might have felt necessary or desirable in light of the new procedure. In addition, petitioner's counsel as well as other other interested parties were not given adequate notice of the file review procedure. Petitioner's counsel was notified late Wednesday afternoon, February 27, that a file review was to be conducted in Washington on either February 28 or March 1. Not until February 28

did counsel learn definitely the file review was to be held on March 1. There was not time to obtain and accumulate new information, clarify existing information or to present all the relevant information. The information submitted by petitioner's counsel had to be sent by telegram without any supporting documents or statements and was submitted under protest, complaining of noncompliance with this Court's order and inadequate notice.

As a result of the Parole Board's actions a report composed under the belief that an institutional review hearing was to be held was used in a "file review" procedure. Petitioner, his counsel, institutional officials and other interested parties were deprived of a realistic opportunity to contribute to the petitioner's file. The cavalier attitude of the Parole Board in postponing any action toward compliance until the final week allowed by the court order, and then changing the proposed procedure several times during that week without notice to petitioner or approval by the Court deprived the petitioner of a fair review and therefore cannot constitute compliance either with this Court's order or with §4208(a)(2).

As the District Court found: "The Board's shift from an institutional hearing to a file review not only failed to comply with this Court's order, but it also occurred with such speed that it impaired the ability of prison officials at Danbury to make the file review completely effective." 376 F. Supp. at 122 n.7.

Unless this finding of the District court was "clearly erroneous" this Court must uphold it. See, e.g., Coalition for Education in District 1 v. Board of Elections, 495 F.2d 1090, 1093-94 (2d Cir. 1974);

F.R. Civ. P. 52(a). This rule applies in actions for habeas corpus. See, e.g., United States ex rel. Oliver v. Vincent, 498 F.2d 340, 344 (2d Cir. 1974); Cf. F.R. Civ. P. 81(a)(2). The facts in this case developed at the March 8 hearing support the Court's finding that the review given the petitioner was cursory and inadequate. Indeed, the Government's brief in this Court does not dispute the propriety of this finding, but rather limits its discussion entirely to the general legal issue. Respondents' Brief at 17-24.

Under these circumstances, if this Court agrees with the District Court that some parole review is required at the expriation of a third of an (a)(2) sentence, then it must uphold that Court's finding that the review afforded in this case was inadequate, unless that finding is clearly erroneous. Not only is Judge Newman's finding not clearly erroneous, it is correct. The judgment below should be affirmed.

III

THE DISTRICT COURT PROPERLY FOUND THAT THE RESPONDENTS DID NOT COMPLY WITH THAT COURT'S ORDER, AND SO PROPERLY ORDERED THE PETITIONER RELEASED FROM INCARCERATION.

On the basis of the facts set out in Part II B of this brief, the District Court found that the respondents had not complied with that Court's conditional order of habeas corpus. 376 F. Supp. at 121, 121 n.4. This mixed finding of law and fact may not be upset unless it is clearly erroneous. United States ex rel. Oliver v. Vincent, supra, 498 F.2d at 344. The District Court ordered that petitioner be released from incarceration unless before expiration of one-third of his sentence he had been given an institutional review hearing by the Parole Board. The respondents did not comply. The required hearing was not provided within the specified period, as extended,* but instead a substitute and less effective "file review" was given. The petitioner was compelled to seek supplementary relief; on that motion, the petitioner was enlarged upon his recognizance on March 4. By its decision of April 30, the District Court formally found non-compliance and ordered the petitioner released from incarceration. 376 F. Supp. at 121-22.

A respondent must comply with a court order, even if the order is unconstitutional on its face, or risk the penalties. Walker v. Birmingham, 388 U.S. 307, 316-20 (1967).

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*The District Court granted a stay of its judgment for one week to February 21 "so that the parole board may have an opportunity to dispatch hearing examiners to...Danbury"; this Court extended that stay to March 1.

The respondents in this action applied to the District Court and then to this Court for a stay of the lower court's order pending appeal; both applications were denied. Instead, each court granted a brief stay of the judgment to allow compliance. The respondents did not move in the District Court for clarification or modification of that Court's order, although they could easily have done so had they entertained any honest doubts about its meaning. Instead, they chose to take the risk of employing a novel and untested review procedure which the District Court had not approved.

Even if the District Court's order was manifestly incorrect, the respondents could not expect to avoid the consequences of non-compliance by an appeal on the merits. Barring a stay or modification, a court order must be obeyed. United States v. Dickinson, 465 F.2d 496, 476 F.2d 373 (5th Cir.), cert. denied, 414 U.S. 979 (1973). A party under the jurisdiction of a court order must act in accordance with that order. In this case, despite an interim period of eighteen days (February 11 to March 1), the respondents did not seek a clarification. Under analogous circumstances, the Supreme Court has held that two days of inaction are sufficient to support a court's finding of civil contempt. Walker v. City of Birmingham, supra at 320-21.

"Respect for the judicial process is a small price to pay for the civilizing hand of law." Id. The Court's finding of noncompliance is not clearly erroneous, and the judgment entered must be affirmed.

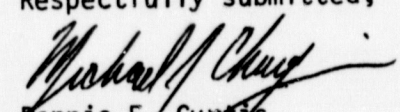
CONCLUSION

The District Court's decision is correct and should be affirmed. An inmate sentenced under 18 U.S.C. §4208(a)(2) is entitled to a meaningful hearing before Parole Board examiners and aided by a representative of his choice, at which he can demonstrate that his institutional performance and rehabilitative progress merit release on parole. The Government would substitute a hearing two or three months after incarceration, the purpose of which is primarily to determine where the inmate stands regarding the Parole Guidelines, and another hearing just prior to release, the purpose of which mainly is to exhort the inmate to comply with the conditions of his release while on parole.

The Government's position is not merely illogical but illegal, because it deprives the (a)(2) inmate of any meaningful consideration of his institutional record and rehabilitative progress, and puts him in a worse position than an inmate with a regular adult sentence.

For all of the foregoing reasons, the judgment of the district court in this matter should be affirmed in all respects.

Respectfully submitted,



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C E R T I F I C A T I O N

This is to certify that a copy of the foregoing brief has been served by mail, postage prepaid, on Thomas P. Smith, Esq., Assistant United States Attorney, Attorney for Respondent-Appellant, this 29th day of October 1974.